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No. 10-621

Supreme Court, U.S.
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In The
Supreme Court of the United States

KEITH C. BROOKS,

Petitioner,

v.

STEVE GAENZLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Keith C. Brooks, through his counsel, Baker Hostetler, LLP, hereby files this reply addressed to points made in respondent's brief in opposition to Brooks' petition for writ of certiorari.

1. The 10th Circuit's *Brooks* Decision Is Dangerous Precedent

The 10th Circuit's *Brooks* decision creates a dangerous exception in the constitutional law of excessive force by recognizing "no substantive difference, for purposes of Fourth Amendment seizure analysis, whether a bullet fails to strike its intended target or strikes the target but inflicts a wound insufficient to bring the fleeing suspect under control." OPPOSITION BRIEF at 18-19. There is, of course, a recognized, substantive constitutional difference between striking and not striking a person with a bullet, the former being a type of seizure this Court deems "unmatched" in its "intrusiveness." *Tennessee v. Garner*, 471 U.S. 1, 10, 105 S.Ct. 1694, 1700 (1985).

Whereas *Garner* and its progeny have discouraged and limited applications of deadly force to narrow, constitutionally-prescribed circumstances, the *Brooks* decision creates a broad, new exception that effectively condones excessive force short of force that precludes escape, and encourages police to dodge liability to persons on whom they have visited excessive force by allowing them to "escape." *Brooks v.*

Gaenzle, 614 F.3d 1213, 1224 (10th Cir. 2010), Appendix at 24; *Brooks v. Gaenzle*, 2009 WL 3158138 (D. Colo.) at *6, Appendix at 52.

Brooks' escape exception allows police to intentionally shoot an unarmed bystander at the scene of a felony shooting, as occurred in *Indehar,* but have no excessive force liability if he flees their assault. Police could shoot a vehicle's passenger, as occurred in *Fisher* and *Vaughan,* yet the passenger would have no excessive force remedy if the driver chooses to flee. Or, police could arbitrarily assault citizens on the street, as occurred in *Dupree,* and incidentally discovered evidence would be admissible if the victim successfully flees the scene but is arrested later. The *Brooks* decision's escape exception is so fraught with constitutional peril that it must be swiftly and soundly overturned.

2. Shooting A Suspect In The Back Is Not A "Show Of Authority"

The brief in opposition fails to defend the 10th Circuit's analysis of a shooting as a "show of authority." A show of authority is an effort to arrest "without the use of physical force." *Brendlin v. California,* 554 U.S. 249, 254 (2007); *California v. Hodari,* 499 U.S. 621, 626, 111 S.Ct. 1547, 1551 (1991) (effort to arrest a show of authority "where [physical force] is absent"). Since Gaenzle applied physical force by shooting Brooks in the back, the show of authority cases, such as *Brendlin,* cited in respondent's brief, and

relied on in the *Brooks* decision, have no application to this case.

3. *Brower* Does Not Have Primacy Over *Hodari*

Overruling *Brower v. County of Inyo,* 489 U.S. 593, 600, 109 S.Ct. 1378, 1383 (1989), was not necessary for *Hodari* to adopt its physical force seizure standard because *Brower's* physical control language was dicta. *Brower,* 489 U.S. at 600, 109 S.Ct. at 1383 (proposition that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control" declared "dicta"). *Hodari* certainly qualified *Brower* by siding with *Brower's* concurring justices' view that physical control, while "characteristic of the typical seizure," is not "an essential element." *Brower,* 489 U.S. at 600, 109 S.Ct. at 1383.

The 10th Circuit's *Brooks* decision erred by affording *Brower* primacy over *Hodari.* Blind adherence to *Brower's* physical control dicta causes respondent to read a passage in *Brower* saying it is "*enough* for a seizure that a person be stopped," and a passage interpreting *Brower* saying "a seizure occurs *whenever*" police effect "termination of movement," to mean that stopping or terminating a suspect's movement is a condition precedent to every seizure. OPPOSITION BRIEF at 14, 17, *citing Brower,* 489 U.S. at 598-99 and *Scott v. Harris,* 550 U.S. 372, 384, 127 S.Ct. 1769, 1778 n. 10 (2007) (emphasis added to both). To say it is "enough" for a seizure to stop someone, or that a

seizure occurs "whenever" one's movement is terminated, merely states *sufficient*, but not *necessary*, conditions to effect a seizure.

If *Hodari* had intended to affirm *Brower's* physical control dicta as a controlling seizure standard, it would have phrased the standard as the application of physical force *that* restrains movement rather than as the "application of physical force *to* restrain movement, even when it is ultimately unsuccessful." *Hodari*, 499 U.S. at 626, 111 S.Ct. at 1550 (emphasis added). By adopting the latter standard rather than the former, *Hodari* rejected the implication of *Brower's* dicta that acquisition of physical control is an essential condition for every seizure. Thus, it was error for the 10th Circuit to afford *Brower's* physical control dicta primacy over *Hodari's* later-enunciated seizure standard.

4. *Hodari's* Seizure Standard Is Not Dicta

The brief in opposition justifies giving *Brower* primacy over *Hodari* by characterizing *Hodari's* seizure standard as dicta, allegedly because it was "an isolated comment" that was "unnecessary to the result." OPPOSITION BRIEF at 16. To the contrary, articulating physical force and show of authority seizure standards was essential to resolving the issue presented in *Hodari*.

According to the *Hodari* Court, "the . . . issue presented [was] whether, at the time he dropped the drugs, Hodari had been 'seized' within the meaning of

the Fourth Amendment." *Hodari*, 499 U.S. at 623, 111 S.Ct. at 1549. This issue required this Court to determine what effect the presence or absence of an application of physical force would have on Hodari's claim that his discarded cocaine should be suppressed as the fruit of an unlawful seizure.

The *Hodari* Court ruled that, because "Hodari was untouched by Officer Pertoso at the time he discarded the cocaine," this absence of physical force rendered the police effort to arrest Hodari a mere "show of authority" prior to the time Hodari discarded the subject evidence. *Hodari*, 499 U.S. at 625, 111 S.Ct. at 1550. But, shortly after discarding the cocaine, Officer Pertoso physically tackled Hodari, which this Court deemed a seizure by physical force.

Because defining show of authority and physical force seizures, and distinguishing between them, was integral to resolving the issue before the Court, *Hodari's* seizure standard is not dismissible dicta. *Connecticut v. Doehr*, 501 U.S. 1, 30, 111 S.Ct. 2105, 2122 (1991) (holdings on issues before the Court not dicta).

5. *Dupree* Does Not Characterize *Hodari's* Seizure Standard As Dicta

Citing Footnote 5 in *United States v. Dupree*, 617 F.3d 724 (3rd Cir. 2010), respondent's brief argues that the 10th Circuit is not alone in pronouncing *Hodari's* seizure standard to be dicta. Respondent is incorrect. *Dupree's* Footnote 5 refers to a discreet passage in *Hodari* that theorizes that a continuing arrest

could have arisen "had [Officer Pertoso] laid his hand upon Hodari to arrest him, but Hodari had broken away and *then* cast away the cocaine." *Dupree*, 617 F.3d at 730, *citing Hodari*, 499 U.S. at 625, 111 S.Ct. at 1550. *Dupree* properly characterizes this discussion of "abstract and hypothetical situations" not before the court as dicta. *Doehr*, 501 U.S. at 30, 111 S.Ct. at 2122. Respondent's arguments notwithstanding, the 10th Circuit's *Brooks* decision, together with its decision in *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010), remain alone among the circuit courts in disregarding *Hodari's* physical force seizure standard as dicta.

6. Snowballs And Hand Grenades

Respondent argues that the "absurd result of a strict application of Brooks' seizure analysis" would be that "a seizure would not occur if an officer used a hand grenade in an attempt to stop a successfully fleeing suspect but the suspect was not physically touched," but that a seizure would occur "if the officer threw and hit the suspect with a snowball" intending to, but not succeeding in, stopping him. OPPOSITION BRIEF at 19. There is nothing "absurd," or in the 10th Circuit's words "illogical," about this result. *Brooks*, 614 F.3d at 1223, n. 7, Appendix at 22.

Tossing a grenade that explodes without striking the suspect with either shrapnel or the force of its concussion is no different than shooting at and missing a suspect. So long as neither produces the suspect's submission, the grenade or the gunshot

are merely unheeded shows of police authority or attempted seizures. Conversely, throwing a snowball, like firing a bullet, is a projection of physical force. If either strikes its intended target for the purpose of attempting to restrain the target's movement, a seizure occurs.

What *is* absurd is pretending that the seizure standard is concerned with the *type* of physical force applied when the standard clearly is concerned only with *whether* it was applied. *Hodari,* 499 U.S. at 625, 111 S.Ct. at 1550 (a person may be seized "by the slightest application of physical force"). The appropriateness of the selected type of force, *i.e.* whether its destructive potential is disproportionate to the circumstances, is the subject of the objective reasonableness test not at issue in this appeal.

When police start carrying snowballs in their holsters, this Court may have the opportunity to affirmatively determine whether it is "absurd" to suggest that a snowball could effect a seizure. In the meantime, however "absurd" it may seem to some, Brooks' theory that a snowball can effect a seizure if applied by police with the intent to restrain, where an exploding grenade will not if it exerts no physical force on the target, is at least logically consistent with *Hodari.*

7. The 10th Circuit Is In Diametric Conflict With Other Circuits

The brief in opposition argues that the *Brooks* decision's conflict with other circuits is not "substantial."

OPPOSITION BRIEF at 19. On the contrary, the *Brooks* decision stands in diametric conflict with how other circuits have applied *Hodari* to shooting and other physical force cases. First, *Brooks* dismisses *Hodari's* seizure standard as dicta while all other circuits adhere to it. Second, *Brooks* deems arrest material to, indeed dispositive of, the seizure question while other circuits deem arrest "immaterial" to their seizure analysis. PETITION FOR CERTIORARI at 13-18, 31-34. Third, *Brooks* creates an escape exception to excessive force liability not recognized by this Court or any other circuit. The conflicts could not be more stark or substantial. PETITION FOR CERTIORARI at 30-31.

The opposition brief argues that the *Brooks* decision can be reconciled with other circuits because the facts in nearly all of the conflicting circuits' cases reflect that the suspect's freedom "was, at least for some period of time, terminated."[1] OPPOSITION

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[1] Assuming restraint in some way is a necessary predicate to a physical force seizure, the question presented by this appeal fairly comprises, and the record is adequately developed for this Court to determine, whether hobbling a suspect by shooting him in the back is sufficient restraint to effect a seizure notwithstanding his escape, or whether acquisition of "physical control" is inherent in inflicting a gunshot wound on a fleeing suspect. *Blonder-Tongue Laboratories, Inc.*, 402 U.S. 313, 321, 91 S.Ct. 1434, 1438 (1971); *Procunier v. Navarette*, 434 U.S. 555, 559 at n. 6, 98 S.Ct. 855, 858 (1978) (this Court's "power to decide is not limited by the precise terms of the question presented"); *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877 (1980); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401

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BRIEF at 20. Noting termination in movement as part of a *factual recitation* does not reconcile the conflicting circuits with *Brooks* if termination of movement played no part *in the reasoning* of the other circuits' decisions. An examination of those decisions reveals it did not. PETITION FOR CERTIORARI at 13-18, 31-34. Some decisions, such as *Vaughan*, openly declare termination of movement "immaterial" to the outcome. Other decisions, such as *Fisher,* demonstrate terminated movement's immateriality simply by not mentioning whether or not the subject vehicle stopped after police shot the passenger. The *Brooks* decision's analytical process, which deems terminated movement a condition precedent to a physical force seizure, cannot be reconciled with other circuits' analytical processes which pay no heed to terminated movement.

Finally, the brief in opposition argues that there is no discernable conflict because decisions outside the 10th Circuit are "insufficiently detailed" or lacking in "clear factual references" that reveal what role terminated movement actually played in their decisions. OPPOSITION BRIEF at 20-22. The reason circuits outside the 10th Circuit do not contain detailed factual references bearing on terminated movement is because, unlike the 10th Circuit, they recognize that terminated movement is immaterial to *Hodari's* physical force seizure standard. Thus, the absence of detailed factual references bearing on

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(1976); *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 568 (1927).

terminated movement outside the 10th Circuit actually proves the existence of a conflict between the analytical framework utilized by those circuits and the 10th Circuit's errant analysis in *Brooks*.

Within two years the 10th Circuit has issued a trilogy of opinions (*Durastanti, Lemery,* and *Brooks*) denouncing *Hodari's* seizure standard as dicta and making termination of movement an essential element of a physical force seizure. No other circuit treats *Hodari's* seizure standard as dicta; no other circuit deems arrest or impaired movement material to the physical force seizure analysis; no other circuit places applications of physical force short of preventing escape outside the Fourth Amendment's protection. Thus, the conflicts between the 10th Circuit and all other circuits are discernable, substantial, and irreconcilable.

CONCLUSION

This Court cannot permit the 10th Circuit's *Brooks* decision to stand. It is not only in diametric conflict with this Court's seizure precedent, as understood and faithfully implemented in the 3rd, 6th, 7th, 8th, and 11th Circuits, it also creates an escape exception that is fraught with potential for constitutional abuse. Even if no other circuit ever follows the 10th Circuit's example, the *Brooks* decision, along with *Durastanti* and *Lemery,* will remain binding precedent within the 10th Circuit, imperiling the rights, and even the safety, of millions of people living

within the 10th Circuit's boundaries. Petitioner Keith C. Brooks accordingly respectfully requests that this Court issue a writ of certiorari to review, and ultimately overturn, the 10th Circuit's *Brooks* decision.

Respectfully submitted.

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